

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THE CONTINENTAL INSURANCE COMPANY,) Case No. 08-2052 SC
Plaintiff,) Related cases:
v.) 07-5800 SC
JOHN JOSEPH COTA; REGAL STONE) 07-6045 SC
LIMITED, FLEET MANAGEMENT, LTD.;) 08-2268 SC
and the M/V COSCO BUSAN, LR/IMO) 08-5096 SC
Ship No. 9231743, her engines,) 08-5098 SC
apparel, electronics, tackle,) 09-1469 SC
boats, appurtenances, etc., in rem,) ORDER REQUIRING
Defendants.) SUPPLEMENTAL BRIEFING

REGAL STONE LIMITED and FLEET)
MANAGEMENT, LTD.,)
Counterclaimants,)
v.)
THE CONTINENTAL INSURANCE COMPANY,)
Counterdefendant.)

REGAL STONE LIMITED and FLEET)
MANAGEMENT, LTD.,)
Cross-Complainants,)
v.)
JOHN JOSEPH COTA,)
Cross-Defendant.)

1)
 2 REGAL STONE LIMITED and FLEET)
 3 MANAGEMENT, LTD.,)
 4)
 5 Third-Party Plaintiffs,)
 6)
 7 v.)
 8)
 9 THE SAN FRANCISCO BAR PILOTS and)
 10 THE SAN FRANCISCO BAR PILOTS)
 11 BENEVOLENT AND PROTECTIVE)
 12 ASSOCIATION,)
 13)
 14 Third-Party Defendants.)
 15)
 16)
 17)
 18)
 19)
 20)
 21)
 22)

9 This matter comes before the Court on the Motions for Partial
 10 Summary Judgment filed by Plaintiff and Counterdefendant
 11 Continental Insurance Company ("Continental") and Cross-Defendant
 12 John Joseph Cota ("Cota"). Docket Nos. 90 ("Continental's MPSJ"),
 13 93 ("Cota's MPSJ"). Defendants, Counterclaimants, and Cross-
 14 Defendants Regal Stone Limited ("Regal Stone") and Fleet
 15 Management, Ltd., ("Fleet") filed an Opposition. Docket No. 97.
 16 Continental and Cota submitted replies. Docket Nos. 102
 17 ("Continental's Reply"), 104 ("Cota's Reply").

18 Continental and Cota moved for partial summary judgment on
 19 the question of whether California Harbors and Navigation Code
 20 section 1198 ("section 1198") is preempted by federal maritime
 21 law.¹ Continental's MPSJ at 1; Cota's MPSJ at 1. If section 1198

22
 23 ¹ California Harbors and Navigation Code section 1198(c)
 states, in part:

24 Every vessel, owner, operator, or demise
 25 or bareboat charterer hiring a pilot with
 26 a state license for the Bays of San
 27 Francisco, San Pablo, and Suisun shall
 either defend, indemnify, and hold
 harmless pilots pursuant to paragraph (1),
 or alternatively, notify pilots of an

1 is not preempted, then the Court can strike the Second Affirmative
2 Defense in the Answer filed by Regal Stone and Fleet, see Docket
3 No. 26 ("Answer") ¶ 64, and the Court can enter judgment against
4 Regal Stone and Fleet on their first claim for relief in their
5 Counterclaim, Cross-Claim and Third-Party Complaint, see Docket
6 No. 27 ("Countercl.") ¶¶ 25-29.

7 In response, Regal Stone and Fleet Management contend that
8 section 1198 does not apply to them. Opp'n at 9-15. Some of the
9 arguments in support of this contention are without merit. Regal
10 Stone and Fleet argue that section 1198 does not apply to them if
11 Cota and/or the San Francisco Bar Pilots Association ("Bar
12 Pilots") engaged in willful misconduct. Id. at 9-10. This
13 argument makes no sense. Section 1198(c)(1)(C) provides that "the
14 obligation to defend, indemnify and hold harmless the pilot . . .
15 shall not apply in cases of willful misconduct." Cal. Harbors &
16 Navigation Code § 1198(c)(1)(C). Hence, if there was willful
17 misconduct, Regal Stone and Fleet would be relying on the statute
18 to avoid the obligation to defend or indemnify Cota.

19 Regal Stone and Fleet argue that section 1198 does not apply
20 because the Bar Pilots passed on to their customers the cost of
21

22 intent to pay for trip insurance pursuant
23 to paragraph (2). If a vessel or its
24 owner, operator, or demise or bareboat
25 charterer does not provide written notice
26 pursuant to paragraph (2) of an intent to
27 exercise the trip insurance option, then
28 the vessel and its owner, operator, and
demise or bareboat charterer will be
deemed to have elected the obligation to
defend, indemnify, and hold harmless
pilots pursuant to paragraph (1).

1 liability insurance in their pilotage rates. Opp'n at 13. Here,
2 again, Regal Stone and Fleet are relying on the provisions of
3 section 1198. They are arguing that the Bar Pilots violated
4 section 1198, not that section 1198 does not apply.

5 Regal Stone and Fleet make one other argument in support of
6 their contention that section 1198 does not apply, and this
7 argument has more merit. Regal Stone and Fleet allege that Hanjin
8 Shipping Company ("Hanjin"), the time charterer, hired Cota to
9 pilot the COSCO BUSAN. Opp'n at 11. Section 1198(c) states that
10 "[e]very vessel, owner, operator, or demise or bareboat charterer
11 hiring a pilot with a state license for the Bay[] of San Francisco
12 . . . shall . . . defend, indemnify, or hold harmless pilots."
13 Cal. Harbors & Navigation Code § 1198(c).

14 Here, at the time of the allision, Regal Stone was the owner
15 of the COSCO BUSAN. Kennedy Decl. ¶ 2.² Fleet provided the crew
16 and technical management of the vessel. Id. ¶ 6. Hanjin was the
17 time charterer. Rajvanshy Decl. ¶¶ 2-3.³ Regal Stone and Fleet
18 allege that they did not hire Cota, and that Hanjin was
19 responsible for proving and paying for pilotage of the COSCO
20 BUSAN. Opp'n at 10-11. Regal Stone and Fleet allege Hanjin was
21 not their agent, and that they did not give Hanjin authority to
22 waive the purchase of trip insurance, or to agree on their behalf

24 ² Kevin Kennedy, a Director of Regal Stone, filed a
25 declaration in support of Regal Stone and Fleet's Opposition to the
Motions for Partial Summary Judgment. Docket No. 99.

26 ³ Kishore Rajvanshy, the Managing Director for Fleet, filed a
27 declaration in support of Regal Stone and Fleet's Opposition to the
Motions for Partial Summary Judgment. Docket No. 98.

1 to defend and indemnify Cota and/or the Bar Pilots. Opp'n at 11;
2 Kennedy Decl. ¶ 11; Rajvanshy Decl. ¶ 6. Case law suggests time
3 charterers are not the agents of vessel owners when contracting
4 for the services of a pilot. See Victory Carriers, Inc. v. The
5 Sea Scout, 164 F. Supp. 701, 703 (N.D. Cal. 1958) aff'd sub. nom.
6 States Marine Corp. of Del. v. Victory Carriers, Inc., 272 F.2d
7 463 (9th Cir. 1959).

8 The Court acknowledges that there are countervailing
9 considerations. Even though the time charter states Hanjin will
10 provide and pay for pilots, Kennedy Decl. ¶ 9, it also states
11 "[t]he owners to remain responsible for . . . acts of pilots," id.
12 ¶ 10. Also, even if the time charterer hired the pilot, this
13 might still count as a situation where the "vessel" hired a pilot.

14 Nevertheless, the Court needs more information before it can
15 determine if section 1198 applies to Regal Stone and Fleet.
16 Continental points out that Regal Stone and Fleet's argument
17 creates "a scheme by which a foreign vessel owner can escape
18 responsibility for complying with section 1198 - simply by never
19 actually permitting the owner to hire the pilot." Continental's
20 Reply at 4-5. This point is a good one, but it does not address
21 the fact that the plain language of section 1198(c) does not
22 include a situation where the time charterer hires the pilot.
23 Continental dismisses Regal Stone and Fleet's argument as simply
24 not relevant to whether section 1198 is preempted. Id. at 5.
25 Similarly, Cota contends that "[a]s a matter of logic and law, the
26 first and primary issue is the one of preemption." Cota's Reply
27 at 3. However, if section 1198(c) does not apply to Regal Stone
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1 and Fleet, then the Court does not need to reach the preemption
2 issue.⁴ Therefore, the Court requires the parties to file
3 supplemental briefs addressing Regal Stone and Fleet's argument
4 that section 1198(c) does not apply to them because Hanjin hired
5 Cota.

6 Based on the above, the Court ORDERS as follows:

- 7 1. The stay on discovery is lifted for the limited purpose
8 of determining whether section 1198(c) applies to Regal
9 Stone and Fleet. The parties to this action shall have
10 forty-five (45) days from the date of this Order to
11 conduct such discovery.
- 12 2. The Court requires the parties to file supplemental
13 briefs addressing whether section 1198(c) applies to
14 Regal Stone and Fleet. Continental and Cota may file
15 separate briefs not to exceed ten (10) pages each.
16 Regal Stone and Fleet may file a joint opposition to the
17 briefs not to exceed twenty (20) pages. Continental and
18 Cota may file separate replies not to exceed five (5)
19 pages. The Court will hold a hearing on the question on
20 December 18, 2009 at 10:00 a.m. in Courtroom 1, on the
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22 ⁴ The Court also takes note of the "fundamental and
23 longstanding principle of judicial restraint requir[ing] that
24 courts avoid reaching constitutional questions in advance of the
25 necessity of deciding them." Lyng v. Northwest Indian Cemetery
26 Protective Ass'n, 485 U.S. 439, 445 (1988). While the Ninth
27 Circuit does not view preemption questions as raising
28 constitutional issues of substance, Knudsen Corp. v. Nevada State
Dairy Comm'n, 676 F.2d 374, 377 (9th Cir. 1982), the doctrine of
constitutional avoidance supports the Court's desire not to reach
the preemption question until it is satisfied section 1198(c)
applies to Regal Stone and Fleet.

1 17th floor, U.S. Courthouse, 450 Golden Gate Avenue, San
2 Francisco, CA 94102. The briefs, opposition, and
3 replies must be filed in accordance with Civil Local
4 Rules 7-2 and 7-3.

5 3. If the Court determines that section 1198(c) does apply
6 to Regal Stone and Fleet, then it will set a new hearing
7 date for Continental's and Cota's Motions for Partial
8 Summary Judgment. There will be no further briefing on
9 the question of whether section 1198 is preempted by
10 federal maritime law.

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12 IT IS SO ORDERED.

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14 Dated: September 21, 2009



15 UNITED STATES DISTRICT JUDGE
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